QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioners, in retaliation for the Unions' selection of non-unit employees to serve on bargaining committees, discontinued their long-standing practices of making their plants available for negotiating sessions and of paying plant employees serving on the bargaining committees for working time lost during negotiations, and denied uncompensated union leave and vacation to employees to inhibit their own participation in contract negotiation at other plants.

2. Whether the Board's order was a reasonable and proper means of remedying the unfair labor practices found.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2226

PROCTER & GAMBLE MANUFACTURING COMPANY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 658 F. 2d 968. The Decision and Order of the National Labor Relations Board (Pet. App. 35a-111a) are reported at 248 N.L.R.B. 953.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1981, and a petition for rehearing was denied on January 8, 1982 (Pet. App. 112a). On April 1, 1982, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 7, 1982 (Pet. App. 113a), and the petition was filed on June 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners (the "Company") have plants at various locations throughout the United States, including Port Ivory, New York; Baltimore, Maryland; Kansas City, Kansas; and Dallas, Texas. The employees at each plant comprise a distinct bargaining unit and are covered by a separate collective bargaining agreement with an independent labor organization at that particular facility (Pet.App. 46a).[1] The Unions belong to the Amalgamation of Independent Oil and Chemical Workers (the "Amalgamation"), which was established by independent unions at several of the Company's plants and which has as a goal the eventual establishment of a multi-plant bargaining unit. The Company opposes that goal (*id.* at 46a-47a).

In the past, contracts had been negotiated by the management at each plant and a Union bargaining committee composed of employees from the particular plant. Occasionally, the Union's attorney would be present. The negotiating sessions were held at the plant, and the employees on the Union bargaining committee were paid by the Company for working time lost during negotiations (Pet. App. 48a, 50a, 94a).

At the Amalgamation's September 1975 meeting, the Unions decided that, during the 1976-1977 contract negotiations with the Company, each Union's bargaining committee would include a representative from each of the other three Unions (Pet. App. 47a). Before or during the 1976-

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[1]The Port Ivory employees are represented by the Independent Oil and Chemical Workers, Inc., the Baltimore employees by the Independent Oil and Chemical Workers, those in Kansas City by the Independent Oil and Chemical Workers of Kansas City, Kansas, and the Dallas employees by the Independent Oil and Chemical Workers of Dallas (Pet. App. 44a). The unions are referred to herein individually as "the Union" and collectively as "the Unions."

1977 negotiations, each Union informed its plant's management that employees from other Company plants ("non-unit employees" or "outsiders") might be asked to serve on the Union's bargaining committee (Pet. App. 48a).[2]

In response, management at each plant unilaterally rescinded the long-standing practices of conducting negotiations in plant conference rooms that previously had been made available free of charge, of compensating unit employees for work time lost while attending bargaining sessions, and of paying the entire cost of the transcripts of the negotiating sessions (Pet. App. 48a, 51a, 67a, 69a, 78a-79a, 87a-93a).

When the Union nevertheless insisted on having outsiders on their negotiating teams, the Company took steps to impede the outsiders' ability to be present at the negotiations. Representatives of each of the Unions requested uncompensated, "union business" leave in order to attend negotiations at another of the plants. The Company denied these requests on the ground that such leave was permitted under existing contract provisions only when the union business concerned the employee's local, and not another local.[3] After their leave requests were denied, the employees requested to use single days of personal vacation time to attend negotiations at other plants, but such requests were also denied by the Company (Pet. App. 54a-57a, 64a-65a, 70a).[4] The Company also denied the Union's requests to

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[2]Because the contracts at each plant had different expiration dates, the negotiations at each plant were conducted at different times. There was an interval of approximately two months between the inception of negotiations at each plant (Pet. App. 4a, 48a, 94a).

[3]The Board found this interpretation of the contracts reasonable (Pet. App. 97a).

[4]The Company denied vacation days to employees Omer Jones (Kansas City Union president) and Walter Donnellon (Baltimore Union president) because it knew bargaining meetings were scheduled at other

meet on weekends or evenings in order to accommodate the outsiders (Pet. App. 51a, 69a-70a, 79a-81a).

The Company refused to sign instruments embodying the terms and conditions of collective bargaining agreements agreed upon at Dallas and Kansas City because the documents included the signatures of non-unit employees designated as members of the bargaining committees at those plants (Pet. App. 71a, 81a-83a). Moreover, at Port Ivory, the Company plant manager threatened employees that the Union would not get as favorable a contract—he estimated five cents per hour less—if the outsiders participated in the negotiations because the Company would want to demonstrate to the other plants the disadvantages of belonging to the Amalgamation (*id.* at 60a-63a).

2. The Board, upholding the decision of the Administrative Law Judge, concluded that the Company had violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) by interfering with the Unions' selection of non-unit employees to serve on the bargaining committees for their respective plants. Specifically, the Board found that the Company had, *inter alia*, discontinued its long-standing practices of making its plants available for negotiating sessions and of paying plant employees serving on the bargaining committees for working time lost during negotiations in retaliation for the Unions' use of outsiders; denied uncompensated Union leave and vacation to employees who intended to participate in contract negotiations at other plants; and refused to sign contracts negotiated at Dallas and Kansas City because the documents included the signatures of non-unit employees designated as members of the bargaining committees at those plants. Also, in agreement

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plants on the requested dates (Pet. App. 55a, 57a). In addition, Jones was suspended for attending contract negotiations in Dallas and Baltimore (Pet. App. 72a-75a).

with the ALJ, the Board found that the Company had violated Section 8(a)(1) of the Act by threatening the employees at its Port Ivory plant with a less favorable contract if the Port Ivory Union insisted on exercising its statutory right to include non-unit employees on its bargaining committee. Finally, the Board agreed with the ALJ that the Company had violated Sections 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discriminatorily denying vacation leave to employees Omer Jones and Walter Donnellon in order to prevent them from participating in contract negotiations at plants other than their own and by discriminatorily suspending Omer Jones for attending the contract negotiations in Dallas and Baltimore and serving as a member of the bargaining committees at those plants (Pet. App. 35a-41a, 107a-108a).

In finding unlawful the Company's discontinuance of in-plant negotiations and payment to employees serving as Union negotiators, the ALJ recognized that "[a]n employer is not under any statutory obligation to make the plant premises available for bargaining negotiations or to pay employees on the Union bargaining committee for lost working time" (Pet. App. 96a). Nevertheless, here, he found (*id.* at 95a), "had the Unions not attempted to include outsiders on their bargaining team, [the Company], at all four plants, would have continued to make the plant premises available for bargaining and would have continued to pay the employees for the lost working time spent in negotiations" (Pet. App. 95a). The ALJ also rejected the Company's contention that its security policy of not allowing non-employees in its plants (except on guided tours) required that negotiations be conducted outside the plant if outsiders were to be included on the negotiating committees. Noting (*id.* at 96a) that no objections had been made in past years to the presence of Union attorneys on negotiating committees and that the three outsiders who were scheduled

to participate would not create a security hazard, the ALJ concluded (*ibid.*) that the Company had "seized upon its security policy as a pretext to dissuade and to make it more difficult for the Unions to include outsiders on their bargaining teams" (Pet. App. 96a). Nor was the ALJ persuaded by the Company's assertion that the issues of access and payment had been resolved "by mutual agreement," *i.e.*, that the Unions' proposal to include outsiders in their negotiating committees constituted a request for a change in bargaining conditions, which the Company countered by an offer to meet outside the plants, which in turn was accepted by the Unions. Rather, the ALJ explained (*ibid.*), "the addition of the outsiders to assist in the negotiations [was not] a change in the bargaining process any more than would be the addition of an attorney, a pension expert, an economist, or anyone whom the bargaining representative believed could be of assistance in bargaining."

Although the ALJ had accepted as reasonable the Company's position that the *contractual* provision for leave for union business was limited to local union business (see page 3 note 3, *supra*; Pet. App. 97a), he nevertheless concluded that the Company's refusal to grant employees uncompensated leave to attend negotiations at other plants was unlawful. The ALJ noted that, in view of its refusal to bargain on weekends or evenings (Pet. App. 99a-100a), the Company, "by denying the uncompensated leave and vacation days, where the purpose of the leave was to participate as a member of the Union negotiating committee at another of the plants, effectively impeded the availability of such representatives to participate" (Pet. App. 101a). The ALJ explained, relying on *Indiana & Michigan Electric Co.*, 235 N.L.R.B. 1128 (1978), supplementing 229 N.L.R.B. 576 (1977), enforced, 599 F. 2d 185 (7th Cir. 1979), cert. denied, 444 U.S. 1014 (1980), that, while an employer does not have to "concede to a Union's request to meet outside of normal

working hours in all cases" (Pet. App. 99a), it may not refuse to do so and at the same time deny uncompensated leave, where the purpose and effect is to frustrate the union's ability to have non-unit employees on its bargaining team (Pet. App. 99a-102a).

The Board's order requires the Company, *inter alia*, to cease refusing to make its plants available for negotiating sessions or to pay employee negotiators in retaliation for the Unions' selection of outsiders to serve on bargaining committees (Pet. App. 109a), and to cease denying to its employees "uncompensated leave and/or vacation time" for them to participate in contract negotiations at other plants (*id.* at 109a-110a). The order also requires the Company, among other things, to reimburse the Unions for the sums spent by them for the use of the off-plant facilities during the 1976-1977 contract negotiations; to make the unit employee members of the bargaining committees whole for any pay lost as a result of work time spent in contract negotiations at their respective plants; and to make Omer Jones whole for any pay lost as a result of, and to expunge from his personnel file any reference to, the discriminatory suspensions imposed on him (*id.* at 37a-38a, 110a).

3. The court of appeals upheld the Board's decision and enforced its order in all but one minor respect, with one judge dissenting (Pet. App. 1a-34a).[5] The court agreed with the Board that the Company had engaged "in conduct which effectively chills its employees' right to select their own bargaining representatives by preventing or discouraging those representatives from fully participating in the negotiations" (*id.* at 11a). It also agreed that substantial

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[5]The court declined to enforce that aspect of the order requiring the Company to sign the 1977 Kansas City contract because that contract had expired by its own terms in 1980 (Pet. App. 21a). No issue concerning this aspect of the court of appeals' decision is involved here.

evidence supported the Board's findings that the Company's assertion of security needs as a justification for its refusal to permit the negotiating sessions to be held within the plant facilities was "a mere pretext," that the Unions had not agreed to the changes in procedure, and that the changes were imposed "as retaliation over the union's inclusion of outsiders" (*id.* at 12a).

The court rejected the Company's assertion (Pet. App. 31a) that the Board's order forces the Company "to capitulate on three bargaining issues—making the plant premises available for negotiations, paying local employee negotiators, and granting employees uncompensated leave to participate in negotiations at another company plant * * *." Rather, the court explained (*ibid.*),

> the prohibition simply does not impose new contractual provisions on the parties. Procter & Gamble may refuse to bargain on its plant premises for other valid business reasons, it does not have to pay local employee negotiators indefinitely, and it is free to develop the form of leave to be granted.

The court also concluded (Pet. App. 13a) that serving as bargaining representative for another union fell within the "good and sufficient reason" criterion of the personal leave provisions contained in at least the existng Port Ivory and Dallas collective bargaining contracts. The court added (Pet. App. 14a):

> * * * Procter & Gamble has the first shot at placing limits on uncompensated leave as long as its limits do not interfere with employees' statutory rights, and particularly with their choice of bargaining representatives. Procter & Gamble also has some leeway to grant employees vacation time or to meet evenings or weekends rather than to grant any uncompensated leave, although utilizing these options necessarily is limited

because of the geographic distances involved. There is no indication that the uncompensated leave remedy will be abused in a manner disrupting Procter & Gamble's business operations. That Procter & Gamble may limit such leave for valid business reasons or choose other alternatives demonstrates the contrary. Procter & Gamble's options also demonstrate that the Board's order does not impose a new contractual provision upon the parties. The cease and desist order serves only to remedy the unfair labor practices found in this case, and as such, we hold that it is a proper exercise of the Board's wide discretion in fashioning remedies. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court therefore is not warranted.

1. The Company does not dispute the settled propositions that employees and their designated bargaining representatives have the right, absent extraordinary circumstances, to select whomever they wish to represent them in bargaining negotiations, and that a demand for non-unit employees' participation in bargaining negotiations is encompassed in that right so long as it is not tantamount to insistence on company-wide bargaining. See, *e.g.*, *NLRB* v. *Indiana & Michigan Electric Co.*, 599 F. 2d 185, 190 (7th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); *Minnesota Mining & Manufacturing Co.* v. *NLRB*, 415 F. 2d 174, 177-178 (8th Cir. 1969); *General Electric Co.* v. *NLRB*, 412 F. 2d 512, 516-517 (2d Cir. 1969); *Standard Oil Co.* v. *NLRB*, 322 F. 2d 40, 44 (6th Cir. 1963). The Company also does not appear to dispute that it could not lawfully alter its

practices of holding negotiations in the plant and paying employee negotiators for the time spent in negotiations during working hours if its purpose were to interfere with its employees' right to select their own representatives.[6] Rather, the Company repeats its assertions (Pet. 6), rejected by the Board and the court of appeals, that it had legitimate security reasons for insisting that the negotiations be conducted outside of the plants and that the access and compensation issues were mutually agreed upon during negotiations with the Unions. These contentions merely take issue with the Board's findings, upheld by the court of appeals, that the Company's alleged security concerns were pretextual and that the changes were imposed unilaterally with a retaliatory motive.

The Company's further contention (Pet. 5, 13-15) that it cannot be faulted for denying its employees leave to attend negotiations at other plants because it reasonably interpreted the contractual union leave provision as limited to local union business similarly ignores the Board's actual findings. The Board, upheld by the court of appeals, did not find a violation simply in the denial of union leave, but rather concluded that the Company's simultaneous refusal to grant vacations or to negotiate during non-working hours operated unlawfully to interfere with the Unions' inclusion of outsiders in their bargaining committees.

The only issue raised by these contentions is whether substantial evidence supports the findings of the Board. That fact-bound issue does not warrant review by this

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[6]The petition does not challenge the Board's findings, upheld by the court of appeals, that the Company unlawfully refused to sign the Dallas and Kansas City contracts, threatened the Port Ivory employees with a less favorable contract and discriminatorily denied vacation leave to two employees, all in retaliation for the Unions' efforts to have outsiders attend bargaining negotiations.

Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as shown in the statement, *supra*, the Board's findings have ample support in the record.

2. There is no merit to the Company's additional contention (Pet. 17-18) that the Board's order improperly dictates substantive terms and conditions of employment. The Board's order does not require the Company to agree to continue negotiating on its premises and paying employee negotiators for work time lost during negotiations. What it does require is that the Company not discontinue these long-standing practices in retaliation for its employees' exercise of their right to choose their own representatives. As the court of appeals pointed out (Pet. App. 31a), the Company is free to cease bargaining on its premises for any valid business reason and may cease paying employee negotiators as well if those decisions are reached after good faith bargaining.

Similarly, the Board's order does not impose a new union leave provision on the parties. To the contrary, it affords the Company the alternative of granting vacation or some other form of uncompensated leave to employees intending to participate in negotiations at another Company facility. Nor does the Board's order preclude the Company from restricting such leave for legitimate business considerations; it merely is intended to ensure that the Company cannot again interfere with its employees' participation in negotiations at other plants through a simultaneous refusal to grant time off or to negotiate during non-working hours.[7] The

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[7]The Company's assertion (Pet. 12-14) that there is no statutory right to leave for the purpose of participating in bargaining negotiations at the employee's own plant, much less at other plants, misses the mark. The Board's position is not that an employer must grant leave for such a purpose, but that it may not withhold it for the purpose of frustrating the employees' right to select their own bargaining representatives.

Board's order is, therefore, a proper exercise of its remedial authority. See *NLRB* v. *Indiana & Michigan Electric Co.*, *supra*, 599 F. 2d at 191 (enforcing order requiring employer to grant uncompensated leave to employees where employer also had refused to negotiate during non-working hours).[8]

The Company's reliance (Pet. 17-20) on *Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), and *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952), is misplaced. In *Porter*, the Court disapproved a Board order that required an employer to grant a union a collective bargaining agreement clause providing for a checkoff even though the employer had not agreed to such a contractual provision during the collective bargaining process. In *American National Insurance*, the Court held that an employer's good faith bargaining for a management functions clause does not violate the Act. Here, the Board's order requires the Company neither to accede to any substantive collective bargaining agreement term nor to cease seeking a particular clause during negotiations, but merely to refrain from action that unlawfully interferes with the Union's right to choose its negotiating representatives.

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[8]The Company's attempt (Pet. 15) to distinguish *Indiana & Michigan Electric Co.* on the grounds that the collective bargaining agreements in that case contained no union leave provisions restricting leave to local union business and that there had been a past practice of granting leave to employees, who were all members of the same union, to attend and participate in other units' negotiations, ignores the fact that the Board's finding here was not based on the union leave provisions, but rather on the Company's refusal *either* to grant vacation or other leave *or* to negotiate during non-working hours. In this respect, the facts of this case are on all fours with *Indiana & Michigan Electric Co.* See 599 F. 2d at 191.

Grief Brothers Corp. v. *NLRB*, 635 F. 2d 531 (6th Cir. 1980), on which the Company relies (Pet. 16), does not conflict with the decision below. In that case, employees at 21 of a Company's plants requested leave to attend an international union conference, which was scheduled during the week rather than over a weekend for the convenience of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1982

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international's staff (635 F. 2d at 532). Here, the vice in the Company's conduct is not simply that it denied leave, but rather that it simultaneously refused to meet at a time when the employees who had been denied leave could participate.